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In the Supreme Court of the United States

OCTOBER TERM, 1985

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

LUZ MARINA CARDOZA-FONSECA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an alien's burden of proving eligibility for asylum pursuant to Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), is equivalent to his burden of proving eligibility for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C. 1253(h).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 767 F.2d 1448. The opinions of the Board of Immigration Appeals (Pet. App. 17a-23a) and of the immigration judge (Pet. App. 24a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1985. The petition for a writ of certiorari was filed on November 5, 1985, and was granted on February 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 101(a)(42) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(42), provides in pertinent part:

The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside

any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion * * *.

Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), provides:

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Section 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h)(1), provides in pertinent part:

The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT

1. Respondent is a 37-year old native and citizen of Nicaragua. She entered the United States on June 25, 1979, as a nonimmigrant visitor authorized to remain until September 30, 1979. After staying in this country beyond that date without permission, respondent was granted the privilege of voluntarily departing the United States by

September 28, 1980. Respondent failed to take advantage of this opportunity, and deportation proceedings were instituted against her in March 1981. Pet. App. 2a, 25a.

a. At a hearing in December 1981 before an immigration judge, respondent, who was represented by counsel, conceded deportability and requested asylum and withholding of deportation pursuant to Sections 208(a) and 243(h), respectively, of the Immigration and Nationality Act of 1952, 8 U.S.C. 1158(a), 1253(h). Pet. App. 25a. Respondent testified that, although "she was a non-political person" (*id.* at 27a), she felt that she would be persecuted in Nicaragua on the basis of the political activities of her brother, who testified that "the Sandinistas would persecute him" because he is "no longer involved with that party or sympathetic to its ends" (*id.* at 25a).

The immigration judge denied respondent's request for asylum and withholding of deportation (Pet. App. 24a-28a). He stated that the governing legal standard was whether respondent had shown "a clear probability of persecution" if she returned to Nicaragua (*id.* at 27a). The immigration judge concluded that there was no evidence "indicat[ing] that the respondent would be persecuted for [her] political beliefs, whatever they may be" (*ibid.*). The immigration judge noted that, whatever the merits of her brother's claim that he would be persecuted, respondent had not shown that any other members of her family faced a similar danger (*ibid.*).

b. The Board of Immigration Appeals dismissed respondent's appeal (Pet. App. 17a-23a). The Board "agree[d] with the immigration judge that the respondent ha[d] failed to establish that she would suffer persecution within the meaning of section 208(a) or 243(h) of the Immigration and Nationality Act" (*id.* at 21a). In response to her contention that "the immigration judge applied the wrong legal standard" to respondent's asylum claim by requiring her to show a " 'clear probability of persecution' "

rather than a " 'well-founded fear of persecution' " (*id.* at 18a-19a), the Board stated that its conclusion would be the same whether it applied "a standard of 'clear probability', 'good reason', or 'realistic likelihood' " of persecution (*id.* at 21a).

The Board determined that respondent "failed to support, through objective evidence, her generalized assertion that she will be subject to persecution based on her brother's political problems with the Sandinistas" (Pet. App. 21a). In support of this conclusion, the Board noted that respondent "admitted that she herself has taken no actions against the Nicaraguan government[,] * * * has never been politically active[,] * * * [has] never assisted her brother in any of his political activities[,] * * * [and] has never been singled out for persecution by the present government" (*id.* at 22a). Finally, the Board characterized respondent's unsupported fears based on her relationship to her brother as "mere speculation" (*ibid.*).

2. The court of appeals reversed the Board's denial of asylum and remanded for further proceedings (Pet. App. 1a-16a).¹ The court held (*id.* at 4a-9a) that an alien's burden of proving a "well-founded fear" of persecution to establish eligibility for asylum is less demanding than the burden of proving a "clear probability" of persecution, which this Court held in *INS v. Stevic*, 467 U.S. 407 (1984), is the proper standard to establish eligibility for withholding of deportation. In reaching its conclusion, the court of appeals rejected (Pet. App. 5a, 11a) the position of the Board of Immigration Appeals (*id.* at 31a) "that as a practical matter" the two standards "converge[]." *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985)

¹ The court of appeals' decision also addressed the Board's denial of relief to another alien, Francisca Rosa Arguello-Salguera, whose case had been separately briefed and argued. We have not sought review of the judgment with respect to Arguello-Salguera.

(Pet. App. 29a-68a). In the court's view, the different formulations of the burdens of proof that it mandated for obtaining asylum and withholding of deportation entailed "a significant practical consequence" (Pet. App. 9a):

The term "clear probability" requires showing that there is a greater-than-fifty-percent chance of persecution. In contrast, the term "well-founded fear" requires that (1) the alien have a subjective fear, and (2) that this fear have enough of a basis that it can be considered well-founded. While in the latter case there must be some objective basis for the fear, contrary to the requirement of the "clear probability" test the likelihood of persecution need not be greater than fifty percent.

So long as an alien subjectively fears persecution, he will be eligible for asylum under the court's test if he can point to specific facts "support[ing] an inference of past persecution or risk of future persecution" (Pet. App. 10a-11a).

The court concluded (Pet. App. 12a-13a) that the Board erred in this case by applying the same burden of proving a clear probability of persecution to respondent's asylum claim as to her claim for withholding of deportation, rather than determining separately whether respondent had a "well-founded fear" of persecution. It therefore remanded for consideration of respondent's asylum claim "under the proper legal standard" (*id.* at 14a). Respondent had not appealed the denial of her request for withholding of deportation (*id.* at 3a), and the court therefore did not disturb the Board's ruling that she is not entitled to that relief.

SUMMARY OF ARGUMENT

In *INS v. Stevic*, 467 U.S. 407 (1984), this Court held that an alien must demonstrate a clear probability or likelihood of persecution in order to establish eligibility

for withholding of deportation. The question presented here, which was left open in *Stevic*, is whether a different eligibility standard applies for asylum, which requires that an alien demonstrate a well-founded fear of persecution. The Board of Immigration Appeals, whose interpretation of the immigration statute is entitled to substantial deference, *INS v. Wang*, 450 U.S. 139 (1981), has concluded that Congress intended the same standard to apply to both forms of relief and that, in practice, a different standard could not in any event meaningfully be applied. There is no basis for disregarding the Board's conclusions.

Congress did not intend to make asylum an alternative to withholding of deportation as the legal bar to deportation of an alien in this country or at its borders who claims that he would be persecuted unless allowed to remain here. Rather, the legislative history of the Refugee Act of 1980 makes clear that Congress added the asylum provision simply to allow aliens to apply for refuge in this country outside of deportation or exclusion proceedings and to provide the opportunity for additional benefits, principally adjustment of status, for those aliens who have been granted withholding of deportation. There is no indication in the legislation history that, in the course of systematizing our immigration laws, Congress sought to establish a second, completely independent, avenue of relief for aliens already in deportation or exclusion proceedings.

The establishment of such an independent basis for avoiding deportation would, moreover, create significant anomalies. By permitting aliens to obtain asylum on a lesser showing of persecution than is necessary for withholding of deportation, the court of appeals' reading of the statute would effectively render superfluous the withholding of deportation section, which has been in the law for decades and was amended in 1980 expressly to implement our international obligations under Article 33 of

the United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. It would also permit aliens who do not face a sufficient likelihood of persecution to bar their deportation to obtain the substantially greater relief afforded by asylum. Nothing in the legislative history suggests that Congress intended such an anomalous result.

This is confirmed by Congress's understanding in 1980 of the "well-founded fear" standard. That language had consistently been interpreted to require precisely the same likelihood or clear probability of persecution that is necessary to make an alien eligible for withholding of deportation. See *In re Dunar*, 14 I. & N. Dec. 310 (1973); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977); *Stevic*, 467 U.S. at 419-420 & n.12. Congress was aware of this interpretation and plainly intended that it continue under the 1980 amendments. See *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978).

In addition to misapprehending the intent of Congress and the words of the statute, the court of appeals ignored the understanding of the Board of Immigration Appeals, achieved through years of adjudicating claims of persecution, that "fine distinctions" in the probability that an individual alien would be subject to persecution "can[not] be meaningfully made." *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 56a). Rather, the inquiry is a qualitative one into whether a persecutor has the capability and inclination to punish the alien on the basis of his race, religion, political opinion, or other characteristic specified in the statute. As applied in this context, "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." *Ibid.* Finally, the imposition of a different burden of proof for asylum than for withholding of deportation could unjustifiably require implementation of a costly and cumbersome dual adjudicatory scheme for deciding whether an alien is entitled to avoid deportation.

ARGUMENT

AN ALIEN'S BURDEN OF PROVING ELIGIBILITY FOR ASYLUM IS EQUIVALENT TO HIS BURDEN OF PROVING ELIGIBILITY FOR WITHHOLDING OF DEPORTATION

In *INS v. Stevic*, 467 U.S. 407 (1984), this Court held that an alien must demonstrate a clear probability or likelihood of persecution, defined as a showing that "it is more likely than not that the alien would be subject to persecution" (*id.* at 424), in order to establish eligibility for withholding of deportation under Section 243(h) of the Immigration and Nationality Act of 1952. To be eligible for asylum under Section 208(a) of the Act, an alien must prove that he is a "refugee" as defined in Section 101(a)(42) of the Act, which requires that he establish a "well-founded fear of persecution." Although the parties and most of the amici in *Stevic* assumed that the standard for asylum is equivalent to that for withholding of deportation,² the Court left open the possibility that the standards might differ (467 U.S. at 425, 430).

The question in this case is the one left open in *Stevic*: whether an alien's burden of proving eligibility for asylum diverges in any meaningful fashion from his burden of proving eligibility for withholding of deportation. The answer to this question requires interpretation of the well-founded fear standard and an understanding of the relationship between asylum and withholding relief. The Board of Immigration Appeals, whose longstanding and consistent view of the statute is entitled to substantial deference, has concluded that the two eligibility standards are, in practical terms, identical and that this result

² Gov't Br. 20-21 & n.21; Resp. Br. 40; e.g., Amnesty Int'l USA Amicus Br. 54-58. But see American Immigration Lawyers Ass'n Amicus Br. 26-27 n.23.

best comports with Congress's intent when it added the asylum provision to the Act in 1980. There is nothing in the language or legislative history of the Act that would justify invalidating the Board's conclusion.

A. The Board of Immigration Appeals' Construction Of The Refugee Act Of 1980 Is Entitled To Substantial Deference

This Court has consistently admonished that "[a]n agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; see, e.g., *Chemical Manufacturers Ass'n v. NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9; *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 844-845 (1984); *United States v. Clark*, 454 U.S. 555, 565 (1982). The phrase "well-founded fear of persecution," like the "extreme hardship" standard at issue in *INS v. Wang*, 450 U.S. 139 (1981), is "not self-explanatory, and reasonable men could easily differ as to [its] construction." *Id.* at 144; see *Stevic*, 467 U.S. at 424 (statute does not define well-founded fear of persecution). Congress, however, "committed [its] definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute." *Wang*, 450 U.S. at 144; see also, e.g., *Connecticut Dep't of Income Maintenance v. Heckler*, No. 83-2136 (May 20, 1985), slip op. 7-8 (footnote omitted) ("an agency's construction need not be the only reasonable one in order to gain judicial approval").

From its earliest opportunity to consider the question in *In re Dunar*, 14 I. & N. Dec. 310 (1973), the Board of Im-

migration Appeals³ has consistently interpreted the well-founded fear standard to require the same showing of a likelihood or clear probability of persecution that has always been required for withholding of deportation. Cognizant of the division among the courts of appeals that has developed since this Court left the question open in *Stevic* (see Pet. App. 32a),⁴ the Board of Immigration Appeals undertook a comprehensive reexamination of its longstanding position that the standards are not meaningfully different in *In re Acosta-Solorzano*, Interim Dec. No. 2986 (Mar. 1, 1985) (Pet. App. 29a-68a). In that decision, the Board carefully reviewed the administrative and judicial interpretations of the withholding and asylum standards, the legislative history of the Refugee Act of 1980, and the relationship between asylum and withholding relief. The Board also discussed the practical application of the burden of proof to individual cases and the administrative difficulties that would be created by applying two separate standards. In light of all of these considerations, the Board adhered to its view that the standards are equivalent and that an alien who is not entitled to obtain withholding of his deportation should not be able to gain the greater relief afforded by asylum.

As we demonstrate below, the Board correctly interpreted Congress's intent. Indeed, it is clear that in 1980 Congress ratified the Board's prior understanding of the meaning of the well-founded fear standard. See, e.g.,

³ With certain exceptions not relevant here, the Attorney General is charged with the administration and enforcement of the Act. 8 U.S.C. 1103(a). He, in turn, has delegated to the Board appellate authority over decisions of special inquiry officers in deportation cases. 8 C.F.R. 3.1(b)(2), 242.17(c). The Board's decisions are final unless referred to the Attorney General. 8 C.F.R. 3.1(d)(2) and (h).

⁴ Compare *Sankar v. INS*, 757 F.2d 532 (3d Cir. 1985) (standards are identical), with the decision below (standards differ) and *Carvajal-Munoz v. INS*, 743 F.2d 562 (7th Cir. 1984) (same). See also page 20 note 14, *infra*.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). The Attorney General's involvement in the drafting of the 1980 amendments and the presentation of the Administration's views to Congress⁵ further support the Board's position. See, e.g., *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984); *Miller v. Youakim*, 440 U.S. 125, 144 (1979). Moreover, the Board's unique expertise in applying the relevant legal provisions to the specific situations of individual aliens requires that special weight be given to its conclusion that the adoption of two separate standards would both make little sense and be administratively unworkable. Cf. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-830 (1984); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). The consistency with which the Board has adhered to its position is also a significant factor supporting its interpretation. See, e.g., *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). For all these reasons, the Board's interpretation of the provisions of the Act governing asylum must be sustained.

B. Congress Did Not Intend To Permit An Alien To Be Eligible For Asylum If He Is Not Eligible For Withholding Of Deportation

Prior to 1980, the Immigration and Nationality Act allowed the Attorney General to withhold the deportation of an alien who faced a likelihood of persecution in the country of deportation. See 8 U.S.C. (1976 ed.) 1253(h).

⁵ See, e.g., H.R. Rep. 96-608, 96th Cong., 1st Sess. 33-34 (1979); *The Refugee Act of 1979: Hearing on S. 643 Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 17 (1979) (testimony of Michael J. Egan, Associate Attorney General) (*Senate Hearing*); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on*

The Refugee Act of 1980 expressly made such withholding mandatory, in conformance with our international obligations. See *Stevic*, 467 U.S. at 421 & n.15. In 1980, Congress also added for the first time a statutory provision for asylum. This was intended to accomplish two purposes: first, to permit aliens in this country to apply for refuge without waiting for the commencement of deportation or exclusion proceedings, and second, to grant aliens who face persecution abroad the opportunity to become permanent residents and, ultimately, naturalized citizens of the United States.

There is no indication that Congress intended that asylum would be an alternative basis for avoiding deportation with a lower eligibility standard than withholding. Such a result ignores the limited purposes of the asylum provision. It would irrationally add a second avenue of relief where none was required and would in consequence make the withholding provision superfluous; and it would lead to the anomaly that aliens facing a lower probability of persecution than is required for withholding would obtain the greater relief available to asylees. This result is also fundamentally at odds with the legislative history of the 1980 Act, which demonstrates that Congress understood that the well-founded fear standard was, in fact, equivalent to the burden of proof required for withholding of deportation.

1. *Asylum was not intended to replace withholding of deportation as the legal bar to deportation of an alien facing persecution abroad*

As this Court noted in *Stevic* (467 U.S. at 425), “[t]he principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures

International Operations of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 71-72 (1979) (testimony of David Martin, Department of State).

governing the admission of refugees into the United States.” Accordingly, “[t]he primary substantive change Congress intended to make under the Refugee Act * * * was to eliminate the piecemeal approach to *admission* of refugees * * * and to establish a systematic scheme for admission and resettlement of refugees.” *Ibid.* (emphasis in original).⁶ The Court held in *Stevic* that Congress did not alter the substantive standard that an alien already in the United States must meet in order to prevent his deportation pursuant to Section 243(h). *Id.* at 424-430. The Court also held that Section 243(h), as governed by this standard, which requires a showing that “it is more likely than not that the alien would be subject to persecution” (*id.* at 424), meets this country’s international obligation not to return any refugee to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. See 467 U.S. at 428-430 n.22. In the course of regularizing our immigration procedures, Congress plainly did not intend to create an alternative avenue for avoiding deporta-

⁶ Refugees had been admitted under three procedures. First, immigrants fleeing Communist-dominated or middle eastern countries because of persecution could be admitted as conditional entrants under former Section 203(a)(7) of the Act, 8 U.S.C. (1976 ed.) 1153(a)(7). Second, large groups of refugees were admitted pursuant to the Attorney General’s parole authority under Section 212(d)(5) of the Act, 8 U.S.C. (1976 ed.) 1182(d)(5). Finally, since 1974, the Attorney General had provided by regulation that aliens could apply for asylum. 8 C.F.R. 108.1 (1976). See *Stevic*, 467 U.S. at 415-416, 420-421 n.13.

⁷ While the United States is not a party to the Convention itself, this country acceded in 1968 to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, which requires (19 U.S.T. 6225) all parties to undertake to apply Articles 2 through 34 of the Convention.

tion, which would unnecessarily give aliens who could not obtain withholding of deportation a second bite at the apple.

a. When the bill that ultimately became the Refugee Act of 1980 was first considered by Congress, it did not contain any provision for asylum. The absence of such a provision left a gap in the procedures to which Congress intended to give statutory sanction: aliens abroad could apply for admission to the United States on grounds of persecution pursuant to Section 207 of the Act, 8 U.S.C. 1157; and aliens within the United States could seek withholding of deportation under Section 243(h), but only after deportation or exclusion proceedings had been commenced against them. However, the bill as originally written did not provide any mechanism for aliens within or at the borders of the United States to apply for refuge in this country without waiting for the commencement of deportation or exclusion proceedings. While such a procedure had been available pursuant to regulation since 1974 (see 8 C.F.R. 108.1 (1976)), a number of witnesses who testified at the congressional hearings recommended that express statutory authorization for the procedure be included in the bill.⁸ This testimony also referred to the need for a

⁸ See *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International); *id.* at 184 (testimony of Mr. Hannum); *id.* at 187-188, 190 (testimony of David Carliner, General Counsel, American Civil Liberties Union); *id.* at 250 (testimony of Wells C. Klein, Senior Vice Chairman, Committee on Migration and Refugee Affairs, American Council of Voluntary Agencies for Foreign Service); *id.* at 364 (statement of the American Jewish Committee); *id.* at 384 (additional statement of Mr. Klein); *Senate Hearing, supra*, at 52, 53 (testimony of Ingrid Walter, Chairman, Committee on Migration and Refugee Affairs, American Council of Voluntary Agencies for Foreign Service); *id.* at 157 (statement of the American Friends Service Committee).

uniform asylum procedure, which would allow aliens within this country an opportunity to obtain the same benefit of permanent residency as those aliens who would be admitted under Section 207 directly from overseas.⁹

Accordingly, the bill was amended to provide a "uniform procedure * * * allow[ing] all asylum applicants an opportunity to have their claims considered outside a deportation and/or exclusion proceeding." 125 Cong. Rec. 23233 (1979) (remarks of Sen. Kennedy). In addition, successful asylees were granted the opportunity to become lawful permanent residents of the United States in a manner similar to (though more restrictive than) that available to refugees admitted from abroad. Compare Section 209(a), 8 U.S.C. 1159(a) (refugees admitted from outside United States), with Section 209(b), 8 U.S.C. 1159(b) (asylees).

Singularly lacking from the legislative history, however, is any indication that Congress intended the asylum procedure to provide an independent, less demanding avenue of relief for aliens, such as respondent, who were already the subject of deportation or exclusion proceedings. To the contrary, it is clear that Congress intended that Section 243(h) would continue to provide the substantive relief of a bar to deportation to those aliens already in the United States, while asylum under Section 208 was viewed simply as codifying and regularizing a procedural mechanism for applying for refuge and for additional benefits beyond the withholding of deportation to the country of persecution required by Section 243(h). See S. Rep. 96-256, 96th Cong., 1st Sess. 9 (1979); H.R. Rep. 96-608, 96th Cong., 1st Sess. 17-18 (1979).¹⁰

⁹ See, e.g., *Senate Hearing, supra*, at 52, 53 (testimony of Mrs. Walter) (asylees should be permitted to adjust to permanent resident status).

¹⁰ This is confirmed by a comparison of the Senate and House bills. The Senate bill, S. 643, 96th Cong., 1st Sess. (1979), expressly provided that an alien could not obtain asylum unless "his deportation or

b. Congress' intent that asylum would not replace withholding of deportation as the legal bar to deportation is confirmed by the various meanings attributed to "asylum" during its consideration of the Refugee Act. While "the term 'asylum' * * * [was] used in various ways" (*Stevic*, 467 U.S. at 427), none of its contexts suggested that it was an independent avenue for barring the deportation of aliens already within the United States. As relevant to such aliens, asylum was used in two senses. First, it was regarded as synonymous with withholding of deportation. See, e.g., *The Refugee Act of 1979: Hearing on S. 643 Before the Senate Judiciary Comm.*, 96th Cong., 1st Sess. 197 (1979) (study prepared by Congressional Research Service); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Judiciary Comm.*, 96th Cong., 1st Sess. 170 (1979) (testimony of A. Whitney Ellsworth and Hurst Hannum, Amnesty International). As such, of course, asylum could not possibly have been considered an independent alternative to withholding of deportation.

Second, asylum was used in reference to the Attorney General's regulations allowing aliens within this country to apply for refuge, which would be given an express statu-

return would be prohibited under section 243(h)." 125 Cong. Rec. 23253 (1979). The House bill, H.R. 2816, did not include this proviso. *Id.* at 37244. Had the Senate bill been enacted, of course, the court of appeals' position in this case would be rejected out of hand. But while the conferees ultimately adopted the House bill, they did not note any difference between the two asylum proposals (although they did describe differences between the House and Senate amendments to Section 243(h)), thus indicating that they assumed that there was no substantial difference between them. All that the conference report stated in this regard was that the bill directed the Attorney General "to establish a new uniform asylum procedure." S. Rep. 96-590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. 96-781, 96th Cong., 2d Sess. 20 (1980). Had the conferees believed that the House bill, unlike the Senate's, made asylum available to aliens who are not eligible for withholding of deportation, they surely would have commented on so important a difference.

tory basis by the asylum provisions added to the Act. See, e.g., H.R. Rep. 96-608, *supra*, at 17.¹¹ Under these regulations, asylum was considered the "functional equivalent" of withholding of deportation. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1029 (5th Cir. 1982). Moreover, as amended in 1979, the asylum regulations expressly provided that applicants would be subject to the same burden of showing that they "would be subject to persecution" that was imposed on applicants for withholding of deportation. See *Stevic*, 467 U.S. at 420-421 n.13; compare 8 C.F.R. 108.3(a) and 236.3(a)(2) (1980) (asylum) with 8 C.F.R. 242.17(c) (1980) (withholding of deportation). That language, as the Court held in *Stevic* (467 U.S. at 422, 424), requires a showing of a likelihood or clear probability of persecution.¹²

¹¹ 8 C.F.R. 108.1 (1976) provided that "an alien who is seeking admission to the United States at a land border port or preclearance station" could apply for asylum "to the nearest American consul." Asylum applications by aliens within the United States or at an airport or seaport were to be submitted to "the district director [of the Immigration and Naturalization Service] having jurisdiction over [the alien's] place of residence in the United States or over the port of entry." Under these regulations, the immigration judges and the Board of Immigration Appeals did not have jurisdiction over asylum claims. If asylum was denied by the consul or district director, the alien was permitted to seek withholding of deportation in subsequent deportation or exclusion proceedings. See *Stevic*, 467 U.S. at 420-421 n.13.

¹² The 1979 regulations conferred jurisdiction over asylum claims on the immigration judges and the Board for the first time. See *Stevic*, 467 U.S. at 420-421 n.13. Once deportation or exclusion proceedings had begun, the request for asylum was interpreted as a request for withholding of deportation. See 8 C.F.R. 108.3(a) (1980) ("A request for asylum introduced by an alien * * * after commencement of deportation proceedings shall be considered as a request for withholding of deportation under section 243(h) of the Act and for the benefits of Articles 32 and 33 of the Convention [which prevent the expulsion of lawfully admitted refugees or the return of any refugee to a

Moreover, in promulgating the 1979 regulations, the Immigration and Naturalization Service expressly rejected suggestions, based on the well-founded fear language of the Convention, that the asylum standard should be less demanding than that for withholding. Citing *In re Dunar, supra*, the agency stated that the purpose of the asylum regulations "is to require the applicant, who has the burden of proof, to substantiate that the fear of persecution is well-founded" by "adduc[ing] evidence supporting the likelihood of persecution," and that any difference in language was merely one of "semantics." 44 Fed. Reg. 21253, 21257 (1979). Once deportation or exclusion proceedings had begun, the regulations clearly contemplated that asylum and withholding of deportation would be equivalent forms of relief. See 8 C.F.R. 108.3(a) (1980); 44 Fed. Reg. at 21255, 21257. Given this understanding of the asylum provision, it is inconceivable that Congress could have intended a lower standard for that relief than was required for withholding of deportation.

2. *It would be anomalous to make asylum available on a lesser showing of persecution than is required for withholding of deportation*

Not only is the legislative history of the Refugee Act 1980 bereft of any indication that Congress intended that asylum would change the substantive standard for obtaining relief from deportation, such a change would make no sense as a matter of policy. The interpretation adopted by the court below would render Section 243(h)—the center-

country where he would be persecuted]."). This further supports our understanding, and that of the Board, that Congress viewed asylum as equivalent, in all relevant respects, to withholding of deportation once deportation or exclusion proceedings had begun.

piece of our domestic legislation implementing this country's international obligations under Article 33 of the Convention—virtually superfluous, and it would make the greater relief afforded by asylum available to aliens facing a lower probability of persecution than is necessary to obtain the lesser benefit of withholding of deportation. Congress surely did not intend such anomalies. Rather, as the Board concluded in *In re Acosta-Solorzano, supra* (Pet. App. 58a n.13), "Congress understood the functions of asylum and withholding of deportation to be closely related and the standards of eligibility for these forms of relief to be essentially comparable."

Congress amended Section 243(h) in 1980 to conform it to Article 33 of the Convention. *Stevic*, 467 U.S. at 421; H.R. Rep. 96-608, *supra*, at 18; S. Rep. 96-590, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. 96-781, 96th Cong., 2d Sess. 20 (1980). As the Court held in *Stevic* (467 U.S. at 428-430 n.22), Section 243(h) implements our international obligation not to return aliens to countries where they would be persecuted. Asylum, by contrast, is not addressed in the Convention. Office of the United Nations High Commissioner for Refugees, *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* 7 (Geneva 1979).

Were the asylum provision to be given the construction adopted by the court below, the withholding provision, with its more demanding burden of proof, would "atrophy into a useless legal appendage." Note, *Rediscovering the Burden of Proof for Asylum and the Withholding of Deportation*, 54 Cin. L. Rev. 943, 964 (1986) (footnote omitted). Since any alien who could establish a likelihood of persecution sufficient to obtain withholding would, *a fortiori*, have established the requisite persecution to be eligible for asylum, with its greater benefits, the avail-

ability of withholding would be virtually meaningless.¹³ Such a result, of course, contravenes "the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect." *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973); see, e.g., *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 513 (1981).¹⁴ And it is particularly contrary to congressional intent here, since it would usurp the role of the withholding provision, which has been in the law for decades (e.g., 8 U.S.C. (1952 ed.) 1253(h); see *Stevic*, 467 U.S. at 414 n.5), in favor of the asylum provision, which was added as "almost an afterthought" to the 1980 Act (Aleinkoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 J.L. Reform 183, 184 (1984)).

¹³ The asylum regulations do provide the Attorney General with discretion to deny asylum in limited circumstances where an alien has shown a likelihood of persecution, such as where he was firmly resettled elsewhere or was guilty of wrongdoing, such as fraud. See 8 C.F.R. 208.8(f)(ii); *In re Salim*, 18 I. & N. Dec. 311 (1982); *In re Lam*, 18 I. & N. Dec. 15 (1981). Even in the absence of Section 243(h), however, it is inconceivable that the Attorney General would actually deport a person eligible for such relief (and not disqualified by prior misconduct; see 8 U.S.C. 1253(h)(2); 8 C.F.R. 208.8(f)(iii)-(vi)) to the country of persecution. Rather, the asylum provisions presumably would be applied in a manner that would prevent deportation but would deny additional discretionary benefits such as adjustment of status. In any event, there is absolutely no indication that Congress had such a limited purpose in mind for Section 243(h).

¹⁴ In *Flores v. INS*, No. 84-4767 (5th Cir. Apr. 11, 1986), the court of appeals concluded that this canon supports different standards for withholding and asylum because the definition of refugee in Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), refers to "persecution or a well-founded fear of persecution." In the court of appeals' view, this disjunctive was intended to encompass any alien who could demonstrate either a likelihood of persecution ("persecution") or a

As we have noted, asylum provides significant benefits that are not available to aliens who have obtained only withholding of deportation. In particular, asylees are eligible to adjust their status to that of permanent residents. Permanent residents may not (in the absence of misconduct) be deported to any country. By contrast, the relief afforded by Section 243(h) bars deportation only to the country or countries in which the alien faces a likelihood of persecution. See Section 209(b) of the Act, 8 U.S.C. 1159(b); 8 C.F.R. 209.2; *In re Salim*, 18 I. & N. Dec. 311, 315 (1982). It would make no sense to attribute to Congress an intent to make the greater relief of Section 208 available to aliens who face a lower probability of persecution than is necessary to obtain relief under Section 243(h). And in any event, the anomaly that would be created by an alternative interpretation surely supports the Board's reading of the statute to make the burdens of proof under the two sections equivalent.

The court below suggested that asylum should be available on a less compelling showing of persecution than is necessary to obtain the mandatory relief of withholding of deportation because the Attorney General has discretion to deny asylum even to aliens who have met the standard. Pet. App. 6a-7a; see also *Carvajal-Munoz v. INS*,

reason for fearing persecution ("well-founded fear of persecution"). See Slip op. 4955 n.8; see also *id.* at 4953. This odd reading of the statute is wholly unsupported by its legislative history, which the court of appeals failed to cite. Use of the term "persecution" in the definition was not intended to establish a "well-founded fear" as an alternative, less demanding standard of proving a probability of future persecution; such a reading would have made the "persecution" branch of the refugee definition completely superfluous. Rather, "persecution" refers only to the situation where the alien had, in fact, been persecuted in the past or is presently experiencing persecution. It says nothing of the meaning of the well-founded fear standard. See H.R. Rep. 96-608, *supra*, at 9; S. Rep. 96-590, *supra*, at 19; H.R. Rep. 96-781, *supra*, at 19.

743 F.2d 562, 575 (7th Cir. 1984). This suggestion is ill founded. Before 1980, the withholding provision was framed in discretionary terms, yet the Attorney General had never exercised that discretion to deny relief to an alien within its provisions. *Stevic*, 467 U.S. at 419 n.11. There is nothing in the legislative history on which to base an inference that Congress would have expected the Attorney General to use discretionary denials of asylum to rationalize the statutory scheme by authorizing the deportation of aliens who meet the requisite showing of persecution for asylum. Thus, while the other benefits of asylum might be denied on discretionary grounds (see page 20 note 13, *supra*), Congress surely did not contemplate that aliens would, as a matter of discretion, be deported to countries where they face persecution.¹⁵ This leads, again, to the unreasonable conclusion entailed by the decision below that Congress established two mutually independent means for avoiding deportation, rendering the more demanding of the two superfluous.

3. Congress intended in 1980 that the well-founded fear standard would continue to be interpreted as equivalent to the likelihood or clear probability standard

The only possible basis for concluding that the eligibility standards for withholding of deportation and asylum diverge is that Section 208(a), 8 U.S.C. 1158(a), requires

¹⁵ Under court of appeals' decision, an alien might establish a sufficient probability of persecution to be eligible for asylum but not for withholding of deportation. The Attorney General would therefore be required, in effect, either to renounce his statutory discretion to deny asylum in those circumstances for aliens who are otherwise eligible for such relief or to deport eligible aliens who have established a well-founded fear (though not a likelihood) of persecution. A choice between these unpleasant alternatives would be avoided by the Board's interpretation of the statute.

that an alien be a refugee, defined in Section 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A), as a person with a "well-founded fear of persecution," in order to qualify for asylum, while Section 243(h), 8 U.S.C. 1253(h), requires that the alien establish that his "life or freedom would be threatened" in the country of deportation in order to be eligible for withholding relief.¹⁶ This difference in terminology, however, does not reflect any difference in the substantive standard that Congress intended to be applied. Rather, consistent with the structure of the Act (see pages 12-22, *supra*), Congress clearly intended that the well-founded fear standard would continue to be interpreted, as it had been before, to require the same showing of a likelihood or clear probability of persecution that had always been necessary to obtain withholding of deportation.¹⁷ As the Board concluded in *In re Acosta-Solorzano*, *supra* (Pet. App. 50a), "[s]ince there is no indication that Congress intended to depart from the accepted judicial and administrative construction of 'a well-founded fear of persecution' and since this construction is consistent with the U.N. Convention and the Protocol, * * * [there is] no valid reason for departing from the construction of the well-founded-fear standard that prevailed in this country prior to the Refuge Act of 1980." See generally *Lorillard v. Pons*, 434 U.S. at 581.

a. The history of United States refugee law and practice prior to 1980 is recounted in *Stevic*, 467 U.S. at 414-420. Before 1968, aliens in this country seeking withholding of deportation were required to show a clear

¹⁶ Both forms of relief are limited to persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A), 1253(h).

¹⁷ The "likelihood" and "clear probability" formulations have always been used interchangeably; both require a showing that persecution is more likely than not to occur. See *Stevic*, 467 U.S. at 419-420 & n.12, 421-422, 424 & n.19; *In re Acosta-Solorzano*, *supra*, (Pet. App. 56a).

probability or a likelihood of persecution. *Id.* at 414-415. This burden required an alien not only to state his subjective fears of persecution but also to substantiate them with objective evidence that he would be singled out for persecution upon his return. See, e.g., *Cheng Kai Fu v. INS*, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968); *Lena v. INS*, 379 F.2d 536 (7th Cir. 1967); *In re Janus and Janek*, 12 I. & N. Dec. 866 (1968).

In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, which binds signatories not to return any "refugee" to a country where his life or freedom would be threatened. See page 13 & note 7, *supra*; *Stevic*, 467 U.S. at 416-418. The definition of refugee under the Protocol employs the well-founded fear standard. The Senate gave its advice and consent to our accession to the Protocol on the express understanding that such action would not alter or enlarge the substance of our immigration laws. See S. Exec. Rep. 14, 90th Cong., 2d Sess. App. 4, 6, 7, 10 (1968); S. Exec. Doc. K, 90th Cong., 2d Sess. III, VIII (1968). Similarly, the President and the Secretary of State advised the Senate (*id.* at III, VII) that "[a]ccession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Thus, as the Court concluded in *Stevic* (467 U.S. at 417), "[t]he President and the Senate believed that the Protocol was largely consistent with existing law."

In 1973, the Board of Immigration Appeals considered whether the well-founded fear standard established by our accession to the Protocol required modification of the likelihood or clear probability standard that had formerly been applied to aliens seeking withholding of deportation. In *In re Dunar*, 14 I. & N. Dec. 310, the Board concluded, consistent with the understanding in 1968 that our law already conformed to the Protocol, that the standards are not materially different. See *Stevic*, 467 U.S. at 418-420. Accordingly, the Board rejected the alien's contention that "[t]his change in terminology [to a well-founded fear of

persecution] relieves the alien of the burden of showing a clear probability of persecution," and it concluded that "the crucial question is whether the [alien's] testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted." 14 I. & N. Dec. at 319.¹⁸ Following *In re Dunar*, the courts of appeals similarly concluded that accession to the Protocol did not alter the standard for establishing eligibility for withholding of deportation, and, like the Board, they used the well-founded fear terminology interchangeably with the clear probability and likelihood language. *Stevic*, 467 U.S. at 419-420 & n.12; see, e.g., *Fleurinor v. INS*, 585 F.2d 129, 132-134 (5th Cir. 1978); *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).¹⁹

b. "The principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States." *Stevic*, 467 U.S. at 425. To that end, Congress eliminated the geographical and ideological restrictions as well as the unsystematic reliance on the Attorney General's parole authority that had previously characterized this country's admission of refugees from overseas. See page 13 note 6, *supra*; *Stevic*, 467 U.S. at 415-416. Congress replaced this patchwork with a unified admissions policy whereby virtually all refugees admitted to the United States enter pursuant to Section 207 of the

¹⁸ See also *In re Chumpitazi*, 16 I. & N. Dec. 629, 631 (1978); *In re Francois*, 15 I. & N. Dec. 534, 538 (1975); *In re Chukumerije*, 15 I. & N. Dec. 520, 522-523 (1975).

¹⁹ In *Carvajal-Munoz v. INS*, *supra*, the Seventh Circuit retreated in some respects from its earlier decision in *Kashani*. See 743 F.2d at 573-574. The crucial question, however, is the state of the law in 1980, when Congress added the well-founded fear standard to the Act. At that time, every court to have considered the question concluded that the standard was not meaningfully different from the clear probability or likelihood standard.

Act, 8 U.S.C. 1157, after screening and selection abroad, subject to numerical limitations set by the President in consultation with Congress.

By contrast, Congress evinced no intent to alter the law concerning aliens already within this country or at its borders who desired to avoid deportation or return to a country in which they feared persecution. See generally *Asylum Adjudication: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 6 (1981). Rather, Congress expressly intended simply to conform United States domestic law to reflect its international obligations under the United Nations Protocol. See H.R. Rep. 96-608, *supra*, at 17-18, quoted in *Stevic*, 467 U.S. at 426-427 n.20; see also, *e.g.*, 125 Cong. Rec. 35814-35815 (1979) (remarks of Rep. Holtzman). As the Senate Report stated, "[t]he substantive standard is not changed; asylum will continue to be granted only to those who qualify under the terms of the United Nations Protocol Relating to the Status of Refugees." S. Rep. 96-256, *supra*, at 9; see also *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (testimony of David Martin, Department of State) ("[f]or purposes of asylum, the provisions in this bill do not really change the standards"). This congressional design is confirmed by the conference reports, which explain that Section 243(h), as amended, was "based directly upon the language of the Protocol and [was] intended [to] be construed consistent with the Protocol." S. Rep. 96-590, *supra*, at 20; H.R. Rep. 96-781, *supra*, at 20.

By the same token, both the House and Senate reports make clear that the new definition of "refugee" contained in Section 101(a)(42)(A) was intended simply to conform to the definition in the Protocol. H.R. Rep. 96-608, *supra*,

at 9; S. Rep. 96-256, *supra*, at 4, 14-15.²⁰ Nowhere in the legislative history of the Refugee Act is there any suggestion that the use of the phrase "well-founded fear of persecution" was intended to alter the standard by which an alien was required to prove eligibility for withholding of deportation or for asylum. Rather, the legislative history indicated that the only change Congress contemplated would result from incorporation of the United Nations' definition was the elimination of the discrimination inherent in the ideological and geographical restrictions that had previously been placed on conditional entry into this country. See *Stevic*, 467 U.S. at 415, 427.²¹

²⁰ See also, *e.g.*, *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) ("[w]hat we have done in the administration bill is simply incorporated the United Nations definitions for 'refugee'"); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 43 (1979) (remarks of Dick Clark, Ambassador at Large and U.S. Coordinator for Refugee Affairs) (the bill "essentially adopts the definition in the United Nations Protocol Relating to the Status of Refugees").

²¹ See also, *e.g.*, *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on International Operations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 71 (1979) (remarks of Doris Meissner, Deputy Associate Attorney General, Department of Justice) (new definition "supplants the definition in the immigration statute right now which limits 'refugee' to certain geographical areas of the world"); *The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 27 (1979) (remarks of Rep. Fish) ("the fundamental change under the legislation, of course, is the replacing of the existing definition of refugee with the definition which appears in the United Nations Convention and Protocol on refugees, thus eliminating ideological and geographical limitations"); S. Rep. 96-256, *supra*, at 15; H.R. Rep. 96-781, *supra*, at 1, 9. While the focus of the inquiry may not have

This discussion of pre-Refugee Act law, our accession to the United Nations Protocol in 1968, and the legislative history of the 1980 Act demonstrates that in 1980, just as in 1968, Congress did not intend to alter the prevailing standard by which an alien in this country or at its borders was required to prove eligibility for preventing his deportation either through withholding relief or through asylum. Congress understood that the well-founded fear standard had consistently been construed as equivalent to the likelihood or clear probability standard, and there is nothing to suggest that it meant to upset this settled administrative and judicial interpretation in 1980. There is, accordingly, no basis for construing the well-founded fear standard incorporated under Section 208(a) to create the anomalies, discussed above, of rendering Section 243(h) superfluous and granting aliens facing a less substantial probability of persecution than is necessary for relief under Section 243(h) the greater benefits afforded by asylum.

C. The Use Of A Lower Eligibility Standard For Asylum Than For Withholding Of Deportation Would Be Administratively Unworkable

Not only is the establishment of a lower burden of proof for asylum than for withholding of deportation contrary to Congress's intent, its implementation would be both impractical and unduly burdensome. There is at bottom no meaningful burden of proof that can be applied short of the likelihood standard already in effect. And the dual adjudicatory scheme required by the court of appeals' rule would be cumbersome, expensive, and of little utility.

been identical, none of the administrative decisions under former Section 203(a)(7) of the Act, which had permitted the conditional entry of refugees from Communist-dominated or Middle Eastern countries, holds that an alien was eligible for such relief on a lesser showing of a likelihood of persecution than was and is required under Section 243(h).

1. The court of appeals has done little to give substance to its preferred burden of proof in asylum cases beyond observing that it is " 'more generous' " (Pet. App. 6a (citation omitted)) than the burden for withholding of deportation and that it requires a "reasonable possibility"—something short of a "likelihood"—that the alien would be persecuted. *Hernandez-Ortiz v. INS*, 777 F.2d 509, 513 (9th Cir. 1985); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985); see also Pet. App. 11a (evidence must "suggest a risk of persecution"); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984) (evidence must show that the alien has "a good reason to fear that he or she will be singled out for persecution"). In mandating such an ill-defined standard, the court of appeals ignored what years of experience adjudicating persecution claims have taught the Board of Immigration Appeals: "the facts in asylum and withholding cases do not produce clear-cut instances in which such fine distinctions can be meaningfully made." *In re Acosta-Solorzano, supra* (Pet. App. 56a). In the final analysis, the Board concluded, "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge." *Ibid.*

The Board carefully explained that the clear probability or likelihood standard, though described as requiring a showing that persecution is more likely than not to occur, does not, in practical application, "require[] an alien to establish to a particular degree of certainty * * * that he will become a victim of persecution." Pet. App. 51a-52a. Accordingly, as the Board went on to discuss, the interpretation of the well-founded fear standard to mandate a lower probability of persecution than is required for withholding of deportation is fundamentally misguided:

Our inquiry in these cases, after all, is not quantitative, *i.e.*, we do not examine a variety of statistics to discern to some theoretical degree the likelihood of

persecution. Rather our inquiry is qualitative: we examine the alien's experiences and other external events to determine if they are of a kind that enable us to conclude the alien is likely to become the victim of persecution.

Id. at 56a. The Board also described in detail the type of showing that an alien must make "as a practical matter":

[T]he evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor had the inclination to punish the alien.

Id. at 52a. The Board also noted that its standard "is nearly identical to that proposed by the authority on international refugee law, Atle Grahl-Madsen, in his treatise on the meaning of the U.N. Convention and the Protocol."

Id. at 48a; see 1 A. Grahl-Madsen, *The Status of Refugees in International Law* §§ 76, 77 (1966).²²

²² The Board further observed that a lower burden of proof is inconsistent with the intent of the drafters of the United Nations Convention, who rejected formulations of the well-founded fear standard that would have required only that the alien's fear be "plausible," "justifiable," or "reasonable." Pet. App. 49a n.11; see, e.g., United Nations Economic and Social Council, *Draft Report of the Ad Hoc Committee on Statelessness and Related Problems*, U.N. Doc. E/AC.32/L.38, at 33-34 (Feb. 15, 1950). Like the rules in the Ninth and Seventh Circuits, the standard recently adopted by the Fifth Circuit in *Flores v. INS*, *supra*, which requires an alien to demonstrate only that his fear of persecution has "some basis in the reality of the circumstances" or that a reasonable person would fear persecution (slip op. 4953), is contrary to this history of the Convention.

Thus, the court of appeals, in requiring a lower burden of proof for asylum cases, failed to appreciate both the reasoning used by the Board in adjudicating these cases and the fact that there is no meaningful way in which to define a lower standard that would be independent of the likelihood test applicable to withholding of deportation. While the court of appeals' test may, in its view, have theoretical virtue merely as a matter of terminology, it simply does not come to grips with the realities of adjudicating persecution claims, a matter in which the Board is expert and in which its conclusions must not be lightly overridden. In addition, the court of appeals' test is inherently vague in application: it requires a showing of something less than a 50% probability of persecution, but how much less is undefined. See *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986) (well-founded fear standard requires a "showing [that] may be slightly less than" a clear probability); *Carvajal-Munoz v. INS*, 743 F.2d at 574-575 ("evidentiary burden [for asylum] is very similar to that connected with the 'clear probability' standard, [but] it is not identical"); see also *Stevic*, 467 U.S. at 424 (noting the "somewhat amorphous" positions of the respondent and amici with respect to the burden of proof required by the well-founded fear standard). Without the benchmark provided by the likelihood or clear probability standard, the Board will be left without sufficient guidance as to how it should be evaluating persecution claims.

2. Finally, the court of appeals' approach would unnecessarily require dual adjudication of each alien's persecution claim. Under the Board's interpretation of the statute, there is a single, uniform assessment of the alien's eligibility for barring his deportation. This has enormous practical significance for the nation's 60 immigration judges and the Board, who are already burdened by the adjudication of over 100,000 deportation cases, including more than 10,000 asylum claims, each year without being

required to weigh the same evidence under two different standards. The costs of such an approach would be greatly magnified, moreover, were the Court to adopt the suggestion of the Seventh Circuit in *Carvajal-Munoz v. INS*, *supra*, that asylum and withholding of deportation requests be considered in two entirely separate hearings. 743 F.2d at 570. Even if, contrary to our submission, the Court were to conclude that different burdens of proof apply, it would make little sense, in view of the closely related purposes served by asylum and withholding of deportation and the identical evidence of persecution relevant to both forms of relief, to impose the additional costs of separate hearings or similar independent, parallel consideration of the request for relief in any particular case.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to that court for disposition under the correct legal standard.

Respectfully submitted.

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